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# Bad Hand? The “New Deal” for EU Consumers

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## 1. Introduction

On 11 April 2018, the European Commission presented its "New Deal for Consumers". This is a package of measures consisting of a general communication,<sup>1</sup> and two legislative proposals for new Directives: the first is a proposal for a Directive which would amend several existing directives to make a range of changes.<sup>2</sup> The second proposal is for a Directive which would establish a new type of representative action for consumer issues throughout the EU.<sup>3</sup> These proposals, along with the earlier proposal for a new Directive on the sale of goods,<sup>4</sup> are the product of the recent review of the Consumer *acquis*, known as the REFIT/Fitness check exercise.

When the REFIT exercise was launched, there were concerns that this would result in a further attempt at widespread maximum harmonisation, but when the Commission presented its report on the Fitness Check in May 2017,<sup>5</sup> it became clear that there would be no extensive changes to EU consumer law. Instead, a range of matters which been identified for further action. The one significant exception to this has been the move to turn the proposal for a Directive on the online and distance sale of goods into a proposal for new rules on the sale of goods generally, albeit set at a maximum harmonisation standard.<sup>6</sup> Interestingly, whilst the imminent Directive on Digital Content and Digital Services gets a frequent mention, nothing is said about the rules on consumer sales in the context of the "New Deal".<sup>7</sup>

The "New Deal" addresses four key areas:

- (1) General improvements to Consumer Protection rules
- (2) An increased ability to impose sanctions on traders who fail to comply with consumer protection rules
- (3) The introduction of a representative action
- (4) Taking action to stop "dual quality" goods (i.e., goods sold under one brand etc. but of varying levels of quality in different Member States).

The focus of this contribution is on (1), (2) and (4), which are all dealt with by the proposal for the Modernisation Directive. The proposal for a representative action (3) is very interesting,

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<sup>1</sup> COM (2018) 183 final.

<sup>2</sup> COM (2018) 185 final.

<sup>3</sup> COM (2018) 184 final.

<sup>4</sup> COM (2017) 637 final.

<sup>5</sup> SWD (2017) 209 final.

<sup>6</sup> COM (2017) 637 final.

<sup>7</sup> Incidentally, the draft report of the European Parliament's IMCO Committee [A8-0043/2018] suggests that this approach only has qualified support, and it remains to be seen if this proposal will succeed.

not least because it is coupled with the possibility to seek redress for consumers in a so-called "mass harm" situation. It merits proper discussion in a separate article.

This article will first provide a brief account of the REFIT exercise by way of background, before discussing the various proposals for change. Whilst each proposal will be considered individually, it is also possible to identify a number of general trends – some more obvious than others. In particular, the approach the European Commission favours in responding to the challenges of the growing digital economy seems to be one of maintaining existing rules as much as possible, with extensions and minor modification to cover the digital environment. The concluding comments will explore this and other themes.

## 2. Background: the REFIT Exercise

The Commission's Regulatory Fitness and Performance Programme ("REFIT") was established to "assess whether the regulatory framework for a policy area is fit for purpose and, if not, what should be changed".<sup>8</sup> The REFIT exercise for Consumer Law began in 2015, and the results were published in 2017. The exercise was underpinned by an *Evaluation and Fitness Check Roadmap*.<sup>9</sup> The Consumer Rights Directive was subject to a separate Evaluation Report<sup>10</sup> which was produced concurrently with the REFIT exercise.<sup>11</sup>

There were five criteria by which the fitness of existing legislation was to be assessed:<sup>12</sup> (i) the *effectiveness* of the directives in achieving their objectives; (ii) their *efficiency* in terms of costs and benefits resulting from their implementation; (iii) contribution of directives to *coherence* of consumer policy as well as any unjustified overlaps, obsolete provisions or gaps; (iv) continuing *relevance* of the objectives pursued by the directives; and (v) the extent of any *EU added value* to national consumer laws.

The *Roadmap* emphasised the dual purpose of EU consumer law of both achieving a high level of consumer protection and removing barriers to EU market integration.<sup>13</sup> There were then two key objectives. The first is best described as the "coherence" objective, according to which there should be a single set of consumer protection rules, with no distinction made between different sales channels: "consumers and traders should be able to rely on the same rules when buying at a distance...and by face-to-face means..., unless objectively justified",<sup>14</sup> and further "...to ensure a coherent legal framework and a high level of protection regarding good sold both at distance and by face-to-face means".<sup>15</sup> The implications of this objective were not particularly reflected in the final report on the REFIT exercise,<sup>16</sup> but it was behind the decision to amend the proposal for what had started out as a one for a Directive on online and distance sale of goods to one covering all sales of goods contracts (with a consumer).<sup>17</sup>

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<sup>8</sup> European Commission, *Smart Regulation in the European Union* COM (2010) 543 final, p.4.

<sup>9</sup> This will be referred to as the "*Roadmap*" hereinafter. Available at: [http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_just\\_023\\_evaluation\\_consumer\\_law\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_023_evaluation_consumer_law_en.pdf) [last accessed 11 May 2018]

<sup>10</sup> COM (2017) 259 final.

<sup>11</sup> *Roadmap*, p.2

<sup>12</sup> *Roadmap*, p.10.

<sup>13</sup> *Roadmap*, p.4.

<sup>14</sup> *Roadmap*, p.8.

<sup>15</sup> *Roadmap*, p.8.

<sup>16</sup> SWD (2017) 209, p.82.

<sup>17</sup> COM (2017) 637 final.

The second objective was to push for more maximum harmonisation, with a claim in the *Roadmap* that maximum harmonisation was essential in the interest of legal certainty and a level playing-field for both traders and consumers in the context of cross-border transactions.<sup>18</sup> In particular, it was suggested that two key directives which are (at least for now) still of a minimum harmonisation character, the Consumer Sales Directive and the Unfair Contract Terms Directive, had resulted in new barriers to the Single Market, causing “consumer detriment”.<sup>19</sup> The strong emphasis on maximum harmonisation was surprising, not least because of the experience after the previous major review of the consumer *acquis* a decade earlier and the failure to achieve maximum harmonisation in the areas of sale of goods and unfair terms through the Consumer Rights Directive.

In addition, “changes in the markets and the behaviour of consumers”<sup>20</sup> were to be examined. This was a nod to the broader policy priority of building the Digital Single Market, and, as discussed below, many of the changes now proposed are related to that. One final surprising suggestion in the *Roadmap*, which does not seem to have been given much serious consideration subsequently, was that EU consumer law could be codified into a “single EU instrument”.<sup>21</sup>

The conclusions of this exercise were published on 23 May 2017.<sup>22</sup> Overall, it was found that many of the existing EU Consumer Law rules were suitable for both the digital environment and the off-line world, so no significant reforms would be necessary. Increased compliance by traders and better enforcement were identified as key action points. Following the publication of its findings, the Commission ran a consultation exercise in early autumn 2017 to gauge public opinion on a range of issues. The results of this consultation fed into what was announced as the “New Deal” Package in April 2018.

### 3. New Consumer Protection Rules

The proposal for the Modernisation Directive<sup>23</sup> deals with general improvements to the substance of EU consumer law, as well as more detailed rules on sanctions for breach of EU consumer law rules. The Modernisation Directive would amend several existing directives by inserting new provisions on a range of issues. Some of these amendments would introduce significant new substantive rules, other changes would be rather minor. In this part, the various changes to the Unfair Commercial Practices Directive will be considered first. Next, there will be a discussion of the amendments to the Consumer Rights Directive. The final, but significant, amendment will be the insertion of new provisions on strong sanctions for breach into the UCPD, the CRD, the Unfair Contract Terms Directive and the Price Indications Directive.

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<sup>18</sup> *Roadmap*, p.8.

<sup>19</sup> *Roadmap*, p.9.

<sup>20</sup> *Roadmap*, p.9.

<sup>21</sup> *Roadmap*, p.9.

<sup>22</sup> European Commission, *Report of the Fitness Check SWD* (2017) 209 final, 23 May 2017. See C.Twigg-Flesner, “Editorial: From REFIT to a Rethink?” (2017) 6 *EuCML* 185.

<sup>23</sup> COM (2018) 185 final.

## A. Changes to the Unfair Commercial Practices Directive

A range of amendments to the UCPD are proposed. The UCPD was adopted in 2005 and introduced a prohibition of all unfair business-to-consumer commercial practices, using a combination of outright prohibitions of certain practices listed in the Annex to the Directive, and a number of flexible tests to assess the fairness of other commercial practices on a case-by-case basis.<sup>24</sup> There are particular prohibitions of misleading and aggressive commercial practices, as well as a general clause designed to catch all other commercial practices which might be unfair. A hallmark of the UCPD is its maximum harmonisation character,<sup>25</sup> and as a consequence, Member States are unable to prohibit particular commercial practices outright except for those listed in the Annex. This has resulted in an extensive body of case-law<sup>26</sup> testing the compatibility of national rules on unfair commercial practices with the UCPD.<sup>27</sup> A further feature of the UCPD is that it does not grant individual consumers a private right of redress for instances where they have encountered an unfair commercial practice; instead, the UCPD relies on enforcement by public bodies.<sup>28</sup>

The Modernisation Directive proposal would introduce a private right of redress, as well as make a small concession to Member States seeking to regulate one particular unfair commercial practice, doorstep selling.

### (i) Individual redress in respect of Unfair Commercial Practices

A new Article 11a would be inserted into the UCPD. This would require Member States to provide for "contractual and non-contractual remedies" for consumers who have been harmed by an unfair commercial practice. The underlying purpose is to ensure that consumers who have been at the receiving end of an unfair commercial practice do not have to absorb their losses – or, as Art.11a would put it, "to eliminate all the effects" of an unfair commercial practice. The proposed Article 11a then specifies that a contractual remedy should *at least* include the possibility to terminate the contract unilaterally (Art.11a(2)), and non-contractual remedies should *at least* include the possibility of compensation for any damages suffered by the consumer (Art.11a(3)).

This provision is somewhat strange. On the one hand, it is welcome that there would be the right to individual redress, because this would improve the protection of consumers against the consequences of unfair commercial practices and would remove any doubts as to whether consumers are already able to recover for any losses they had suffered. To some extent, it is already possible for consumers to rely on their private law rights at national law against a trader who has engaged in an unfair commercial practice, insofar as the particular behaviour would also be caught by doctrines of national contract law dealing with misleading or

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<sup>24</sup> See generally G Howells, H-W Micklitz and T Wilhelmsson, *European Fair Trading Law* (Ashgate, 2006).

<sup>25</sup> Cf. Art.4 UCPD.

<sup>26</sup> For a detailed analysis of the UCPD and the related case-law, see G.Howells, C.Twigg-Flesner and T.Wilhelmsson, *Rethinking EU Consumer Law* (Routledge, 2017), ch.2.

<sup>27</sup> E.g., Joined cases C-261/07 *VTB-VAB Belgium NV v Total Belgium NV* and C-299/07 *Galatea BVBA v Sanoma Magazines Belgium NV* ECLI:EU:C:2009:244; C-13/15 *Cdiscount SA* ECLI:EU:C:2015:560; C-288/10 *Wamo BVBA v JBS NV, Modemakers Fashion NV* ECLI:EU:C:2011:443.

<sup>28</sup> Art.11 UCPD.

aggressive behaviour.<sup>29</sup> However, national laws vary in the extent to which they would make available such private law rights, and so a general requirement to introduce this specifically in respect of unfair commercial practices would clarify the currently rather uncertain situation for individual consumers.

On the other hand, however, the proposed Art.11a is rather vague in its requirements. It does little more than to require the Member States to introduce contractual and non-contractual remedies, but a lot is still left to the discretion of each Member State. Art.11a specifies that termination of a contract must be one such remedy, presumably in those circumstances when a contract has been concluded as a result of an unfair commercial practice. However, the proposal does not offer any detail with regard to the conditions for the exercise of this right. Similarly, non-contractual remedies must include damages, which might be intended to cover circumstances where a consumer did not enter into a contract at all, but presumably, compensation should also be available to a consumer who *has* concluded a contract because of an unfair commercial practice and suffered loss as a result (e.g., by paying more than necessary, or by being tied into a contract unawares). Moreover, the inclusion of the “non-contractual” right to compensation would deal with circumstances where a consumer does not have a direct contractual claim against the wrongdoing trader, e.g., where the trader in question is a manufacturer rather than the retailer.<sup>30</sup> It would provide direct recourse against the trader responsible for the unfair commercial practice, and broaden the basis of liability in an important manner.<sup>31</sup>

There are many unresolved questions at this point. First of all, it is not clear whether these remedies should be available for all types of breach. The UCPD has outright prohibitions, as well as prohibitions of misleading actions, misleading omissions, and aggressive conduct. One might assume that, in the absence of any limitations on the right to redress in the proposed Art.11a UCPD, individual redress should be available in respect of all types of unfair commercial practice. This would be akin to the approach taken in Ireland, for example.<sup>32</sup> This general approach may be contrasted with that in the UK, where the Law Commission was asked to make recommendations for a private right of redress.<sup>33</sup> This resulted in the introduction of private remedies only in respect of misleading actions and aggressive practices,<sup>34</sup> which must have been a significant factor in the consumer’s decision to enter into a contract.<sup>35</sup>

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<sup>29</sup> In English law, for example, the doctrines of misrepresentation, duress and undue influence would provide relief to a consumer in respect of some categories of unfair commercial practices.

<sup>30</sup> The example cited by the Commission is the so-called “Dieselgate” scandal. It notes that many consumers were unable to claim remedies from the car manufacturers in question: see COM (2018) 185 final, p.13.

<sup>31</sup> In the context of the sale of goods, it might overlap with the rights against a seller of goods for non-conformity arising from public statements under Art.2(2)(d) of the Consumer Sales Directive (99/44/EC).

<sup>32</sup> See s.74 Consumer Protection Act 2007.

<sup>33</sup> Law Commission, Report No 332/Scottish Law Commission, Report No 226 - *Consumer Redress for Misleading and Aggressive Practices* (TSO, 2012).

<sup>34</sup> See the amendments made to the Consumer Protection from Unfair Trading Regulations 2008 by the Consumer Protection (Amendment) Regulations 2014. On these changes, see G.Woodroffe, C.Twigg-Flesner and C.Willett (eds.), *Woodroffe & Lowe – Consumer Law and Practice*, 10<sup>th</sup> ed. (Sweet & Maxwell, 2016), pp.130-2.

<sup>35</sup> See Reg.27A of the Consumer Protection from Unfair Trading Regulations 2008, as amended.

Secondly, would the right to compensation only be available if a consumer entered into a contract, or would it be available also in circumstances when a consumer did not conclude a contract, but still suffered some loss? Take the example of a consumer who, after receiving promotional material about a holiday offer, takes a morning of work to visit the travel agent, parks her car in a pay-and-display car park, and then discovers that the promotional material was misleading and declines to book the holiday. No contract was concluded, but some loss has been suffered (half a day of her holiday entitlement, car-parking charges etc). Should these losses be recoverable as a “non-contractual” loss? The danger here is that it would expose traders to claims for compensation which might be difficult to quantify.

Thirdly, what limitations or pre-conditions could each Member State impose on the availability of the two remedies to be made available? For example, the right to terminate could be subject to a time-limit, and the right to compensation could be limited so that any compensation recoverable might be staggered<sup>36</sup> rather than based on all the losses suffered. And if compensation were to cover all the losses the consumer has suffered, what sort of remoteness criteria might be introduced to keep the liability of the trader within reasonably foreseeable limits? Moreover, would such compensation also extend to non-financial losses, such as the alarm, distress or inconvenience caused by the unfair commercial practice?<sup>37</sup> All of these questions would need to be considered by the Member States when giving effect to the requirements of Art.11a, and this has the risk of creating more divergence than consistency. Bearing in mind the focus on clearer sanctions elsewhere in the proposal (see below), this vagueness is surprising.

Fourthly, one cannot assume that all traders guilty of an unfair commercial practices had the intention to deceive and may sometimes quite innocently violate the requirements of the UCPD.<sup>38</sup> So it may be necessary to consider whether there should be pre-conditions on the liability of a trader to provide individual redress, whether that be the need to show intention by the trader, reckless or careless conduct, or persistence of the conduct. Instead of pre-conditions on the right to claim redress, a number of defences to address these issues might be made available to a trader instead (which would shift the burden from the consumer to the trader).

One final question might be noted here, and that is whether it should be necessary for an individual consumer to prove that they were, in fact, influenced by the unfair commercial practice in taking a decision they would not have taken otherwise. A trader may have been engaging in unfair commercial practices, but a particular consumer might have concluded a contract with that trader without having been influenced by that unfair commercial practice and without suffering any loss. Alternatively, the influence of the practice might have been negligible and the consumer would have proceeded with the contract even if the practice had not been committed. It will be necessary to settle this question as part of the introduction of private redress.

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<sup>36</sup> The UK’s rules provide for compensation (or “discounts”) in a stepped manner, ranging from a 25% reduction for effects which are “more than minor” to 100% for very serious practices: Regulation 27I of the Consumer Protection from Unfair Trading Regulations 2008.

<sup>37</sup> Such compensation is available in the UK: see Regulation 27J of the Consumer Protection from Unfair Trading Regulations 2008.

<sup>38</sup> Cf. C-435/11 *CHS Tour Services GmbH v Team4 Travel GmbH* ECLI:EU:C:2013:574

All of these issues need to be considered in developing a set of remedies for individual consumers, and there will undoubtedly be others, too. One might expect that this provision will develop and become more detailed as the proposal progresses through the legislative stages. With divergences in the availability of individual redress having been singled out for action, it will surely not end with a rather basic obligation on the Member States to make something available.

This does not mean to suggest that the introduction of individual remedies for unfair commercial practices would not be a welcome development. However, the current proposal does little more than establish a basic principle, with Member States left to work out what could be very complex rules. The interaction of such a new individual right of redress with existing contractual and non-contractual remedies would require careful calibration. Indeed, the introduction of these remedies might sit uneasily with established categorisations of remedies in some Member States. The Commission's justification for this rather limited proposal seems to be that it is the most proportionate action.<sup>39</sup> Proportionality requires that EU action does not "exceed what is necessary",<sup>40</sup> but it does not stop the EU from doing what *is* necessary, and as the brief discussion above indicated, more detail regarding the shape of the private right of redress would be necessary.

#### (ii) Right for Member States to restrict or prohibit certain off-premises contracts on grounds of public policy or protection of private life:

A further amendment to the UCPD would give Member States the possibility to restrict or prohibit the conclusion of contracts in the case of unsolicited visits by a trader to a consumer's home or commercial excursions organised by the trader. Hitherto, such rules would have been in conflict with the maximum harmonisation approach of the UCPD, but it has been recognised that the impact on cross-border sales of such national restrictions would be minimal, and Member States should be free to take appropriate action at national level (in accordance with subsidiarity).<sup>41</sup> This would be achieved by replacing Arts.3(5) and (6) UCPD<sup>42</sup> with a provision permitting the adoption of "provisions to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices" in these two situations. Any such national rules would have to be notified to the Commission promptly, which in turn has to publish information about these on a dedicated website.<sup>43</sup>

On the one hand, this appears to be a modest and even insignificant provision. On other hand, it is an acknowledgement - albeit a small one - that the current maximum harmonisation approach of the UCPD can be detrimental to a high level of consumer protection as it removes all scope for any action by an individual Member State to deal with localised problems.<sup>44</sup> Although this provision seems uncontroversial, it constitutes the first serious dent in the armour

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<sup>39</sup> See COM (2018) 185 final, p.9.

<sup>40</sup> Art.5 TEU.

<sup>41</sup> COM (2018) 185 final, p.9.

<sup>42</sup> In their original form, these paragraphs provided for a six-year grace period in respect of more restrictive provisions than those in the UCPD, which had been adopted to implement directives based on a minimum harmonisation approach. This period expired in June 2013.

<sup>43</sup> Proposed Art.1(1) of the Modernisation Directive.

<sup>44</sup> This has prompted numerous references to the CJEU: see G.Howells, C.Twigg-Flesner and T.Wilhelmsson, *Rethinking EU Consumer Law* (Routledge, 2017), ch.2, pp.73-84.



of maximum harmonisation. Fundamentally, it reflects the fact that localised issues with no cross-border implications exist and that the possibility of Member State action in derogation from the UCPD's maximum harmonisation standard should be considered. Limiting this to one particular instance (of door-step selling) will be difficult to sustain, and one might expect the European Parliament or other Member States to either push for exceptions to permit responses to other localised practices, or for a general derogation in respect of unfair commercial practices with a particular effect in one Member State but without a cross-border dimension. It might even prompt discussion of whether a proper safeguard procedure should be added to the UCPD, which would allow Member States to prohibit particular commercial practices outright where these cause particular problems in that Member State, subject to notification to the Commission.

### (iii) Dual Marketing:

A third amendment would be to Article 6(2) UCPD, which specifies certain misleading practices. It would be extended to include "Any marketing of a product as being identical to the same product marketed in several other Member States, while those products have *significantly* different composition or characteristics".<sup>45</sup> This is essentially dealing with a problem which was presented as the "dual quality" of goods problem,<sup>46</sup> although as phrased, it extends to all products (under the UCPD, "products" includes "any goods and service"<sup>47</sup>). The general intention is that the same product marketed in different Member States should not have significantly different characteristics, where this would have the effect of causing the average consumer to take a transactional decision he would not have taken otherwise.<sup>48</sup>

This may seem a very sensible provision, although it might also catch instances where certain foodstuffs marketed by one brand as the same product (e.g., mayonnaise) is based on different recipes depending on where it is sold to reflect different national tastes (e.g., the level of mustard in the mayonnaise). Such variations could be "significant", and yet reflect national preferences. Of course, it might be arguable that an average consumer would not take a different transactional decision if they knew that the recipe was tailored to the particular domestic market. However, it seems that this proposal, as drafted, is too broad and does not allow for justified national variations in the composition of some products.

### (iv) "Complaint handling" removed from material information in the case of an invitation to purchase:

A minor amendment to the UCPD is the removal from Art.7(4)(d) of "the complaint handling procedure". Art.7(4) deals with information to be provided in the case of an invitation to purchase, and the REFIT check indicated that this particular information would be more relevant in the pre-contractual context, but unnecessary in the case of an invitation to purchase.

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<sup>45</sup> Art.1(2) of the Modernisation Proposal.

<sup>46</sup> COM (2018) 185 final, p.4

<sup>47</sup> Art.2(c) UCPD. Note that the definition of product does not extend to digital content (and may not extend to digital services). As currently drafted, the Modernisation Directive would not extend the definition of product in the UCPD, which seems surprising.

<sup>48</sup> Art.6(2) UCPD.

#### (v) Paid-for search results

A further minor, but important, amendment is to one of the outright prohibitions in the Annex to the UCPD. Paragraph 11 of the Annex would be amended to add “providing information to a consumer’s online search query” without making it clear that the search results are paid for to the prohibition.<sup>49</sup> The purpose is to ensure transparency about search results, so a consumer can identify whether a particular result has been displayed because it directly flows from the search query, or because this result has been included in return for payment. It should therefore enable consumers to distinguish better between the different types of search results commonly encountered in many on-line situations and to follow-up on those results which are relevant to their query.

## B. Amendments to the Consumer Rights Directive

The Consumer Rights Directive (2011/83/EU) (“CRD”) was adopted in 2011 and marked the final legislative outcome of the previous review of the consumer *acquis*. In essence, the CRD deals with pre-contractual information duties and the right of withdrawal in a range of contracting circumstances.<sup>50</sup> The proposed Modernisation Directive would make several important changes to the CRD.

#### (i) Extension of Consumer Rights Directive to cover digital services provided in return for data

Although the CRD already covered contracts involving the supply of digital content, this was limited to contracts where a consumer pays money for the digital content. It also did not clearly cover so-called digital services (e.g., cloud computing). Various amendments would be made to the CRD to broaden its scope to include digital services, as well as digital content provided in return for personal data. This would be done to ensure that the CRD is fully suitable for the digital single market, and to align it with the forthcoming Directive on Digital Content and Digital Services.<sup>51</sup> Extensive amendments and additions would be made to the definitions in Art.2 CRD.<sup>52</sup> Thus, the definition of “service” contract would be extended to cover contracts for digital services, and a new definition of “digital service” and “digital service contract” would be added. A “digital service” would be defined as

“(a) a service allowing the consumer the creation, processing or storage of, or access to, data in digital form; or (b) a service allowing the sharing of or any other interaction with data in digital form uploaded or created by the consumer and other users of that service, including video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media.”<sup>53</sup>

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<sup>49</sup> Paragraph 11 of the Annex already covers editorial content which has been paid for, including advertorials and paid product placement.

<sup>50</sup> See e.g., G.Howells, C.Twigg-Flesner and T.Wilhelmsson, *Rethinking EU Consumer Law* (Routledge, 2017), ch.3.

<sup>51</sup> This will be the end product of the proposal for a Directive concerning contracts for the supply of digital content (COM (2015) 634 final). See e.g., R.Schulze, D.Staudenmeyer and S.Lohse (eds.) *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps* (Nomos, 2017).

<sup>52</sup> By Art.2(1) Modernisation Proposal.

<sup>53</sup> Proposed Art.2(17) CRD.

A “digital service contract”<sup>54</sup> would be a contract for the supply of a digital service, either against payment or against the provision of personal data<sup>55</sup> (where this data is more than needed just to provide the service). The definition of “digital content” is also changed to align it with the forthcoming Digital Content and Services Directive, and will now cover “data which are produced and supplied in digital form, including video files, audio files, applications, digital games and any other software”.<sup>56</sup>

Amendments would then also be made to the relevant items in the list of pre-contractual information required under Art.5 and Art.6 CRD to ensure these cover both digital content and digital services. Art.6(1)(c) CRD, dealing with the trader’s contact methods, would further be amended to remove “fax number” and add “other means of online communication which guarantee that the consumer can keep the correspondence with the trader on a durable medium” to that Article. This has been done to reflect changes in communication technology, especially the increased use of on-line forms and chats for providing customer service.<sup>57</sup> The phrase chosen is intended to be technologically neutral, to ensure that it will cover other forms of online communications that might emerge, which is a sensible step.<sup>58</sup>

All of these changes seem essential to ensure that the CRD’s scope is defined in such a way as to fully encompass both online and offline transactions.

#### (ii) Additional information duties for online marketplaces

An interesting addition to the CRD would be the new Art.6a,<sup>59</sup> introducing additional information requirements for contracts concluded via online marketplaces (defined as “a service which allows consumers to conclude online contracts with traders and consumers on the online marketplace’s online interface”<sup>60</sup>), more commonly referred to as online platforms.<sup>61</sup> This would require the provision of information about:

“(a) the main parameters determining ranking of offers presented to the consumer as result of his search query on the online marketplace;

(b) whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the online marketplace;

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<sup>54</sup> Proposed Art.2(18) CRD.

<sup>55</sup> This would have the same meaning as under the General Data Protection Regulation 2016/679, Art.4(1): see proposed Art.2(4a) CRD.

<sup>56</sup> Proposed amended Art.2(11) CRD.

<sup>57</sup> COM (2018) 185, p.16.

<sup>58</sup> Corresponding changes would also be made to the Model Withdrawal Form in Annex I CRD by Art.2(11) Modernisation Proposal.

<sup>59</sup> Art.2(4) Modernisation Proposal.

<sup>60</sup> Proposed new Art.2(19) CRD. The CRD’s definition would follow the definition of “online interface” in Art.2(16) of the Geo-Blocking Regulation (2018/302) – “any software, including a website or a part thereof and applications, including mobile applications, operated by or on behalf of a trader, which serves to give customers access to the trader’s goods or services with a view to engaging in a transaction with respect to those goods or services”.

<sup>61</sup> The likes of amazon, eBay, etsy and many others.

(c) whether consumer rights stemming from Union consumer legislation apply or not to the contract concluded; and

(d) where the contract is concluded with a trader, which trader is responsible for ensuring the application of consumer rights stemming from Union consumer legislation in relation to the contract. This requirement is without prejudice to the responsibility that the online marketplace may have or may assume with regard to specific elements of the contract."

To this, Recital 19 would add that this information has to be provided in a clear and comprehensible manner, and that it would not suffice merely to do this through a "reference in the standard Terms or Conditions".

The first of these new items of information would be a transparency rule regarding the criteria which are applied by an online marketplace in presenting search results to a consumer. For example, it would have to be made clear whether products offered by some traders, or the platform itself, are ranked higher than other offers, and on what basis. However, and importantly, it would not require an online marketplace to reveal its algorithms.<sup>62</sup> Information would only have to be given about the main parameters, and it would not be necessary to customise this for every search query.<sup>63</sup> To some extent, this information requirement and the extended prohibition in paragraph 11 of the UCPD discussed earlier would overlap – if a particular search result is paid for, then this has to be disclosed under the latter provision.

There is an interesting parallel to this particular item of information with the proposed *Regulation on promoting fairness and transparency for business users of online intermediation services*.<sup>64</sup> Art.5 of that proposal would require that the main parameters for displaying search results, including reasons for their relative importance, are set out in the online intermediation service's<sup>65</sup> terms and conditions. This obligation is intended to complement the new information requirement which would be introduced by Art. 6a(a) CRD.<sup>66</sup>

The remaining three requirements would deal with a much more fundamental difficulty, which has been of general concern in the platform economy. On many websites, it is possible for both private individuals and traders to offer products for sale. A customer will often not know if the supplier is a trader or not, and consequently, if consumer law will apply. These new requirements would require an online marketplace to provide information about whether the supplier is a trader or not, and flowing from that, whether consumer law would apply to the transaction.

Importantly, an online marketplace would not be put under a duty to check whether a supplier is a trader or a private individual.<sup>67</sup> The supplier would have to declare its status to the online marketplace so the online marketplace could provide whatever information has been so declared about the supplier's status to the consumer.

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<sup>62</sup> Recital 19.

<sup>63</sup> *Ibid.*

<sup>64</sup> COM (2018) 238 final.

<sup>65</sup> Defined in Art.1(2) of the proposed Regulation.

<sup>66</sup> COM (2018) 238 final, p.3.

<sup>67</sup> Confirmed in Recital 20, which also refers to Art.15(1) of the Electronic Commerce Directive (2000/31/EC) (no general obligation to monitor).

At face value, an information duty on this issue seems attractive because it is targeted at one area of concern regarding online marketplaces – the lack of clarity about a supplier's status and the applicability of consumer law. However, this proposal simply does not go far enough. Most importantly, there is no indication of the criteria which would need to be applied in distinguishing between a trader and a non-trader. Of course, in many cases, it will be obvious whether a supplier is a trader. However, a feature of many platforms featuring mixed suppliers (traders and non-traders) is that some suppliers may have started out as a private supplier ("hobbyist"), but subsequently, their activities have reached a level which would mean that this supplier should now be regarded as a trader.<sup>68</sup> There is a strong need to identify at least an indicative set of criteria which can be used to determine whether a supplier should be regarded as a trader or not. Otherwise, some suppliers will be left with the uncertainty of not knowing quite when they cross the threshold from individual to trader, and the risk of making a false declaration as to their status.

In this regard, it should be noted that the proposal does not address the consequences for the online marketplace, nor the supplier, of making a false declaration as to their status and therefore the applicability of consumer law. The online marketplace would be subject to the general sanctions under the CRD (see below on changes to the Articles dealing with sanctions), and both the online marketplace and the supplier failing to disclose that they are a trader would probably also be in breach of Art.6(1)(g) UCPD (misleading action regarding the consumer's rights). However, it may be that this is not the intended consequence. Once more, therefore, important issues have not been addressed properly in this proposal.

### (iii) Right of withdrawal changes

Several adjustments to the scope of the right of withdrawal are then proposed. Some of these reflect the wider scope that would be given to the CRD to cover all types of contract for the supply of digital content, as well as digital services, discussed earlier. Others changes are based on a desire to reduce identified burdens on traders.

Starting with the changes to reduce burdens on traders, two significant changes are made. The first deals with what should happen once a consumer has exercised the right of withdrawal. Under the current Art.13 CRD, a trader is obliged to reimburse all payments once notice of the consumer's decision to withdraw has been received and no later than within 14 days from that point. A reimbursement could be withheld under Art.13(3) CRD until the goods are returned or until the consumer has supplied evidence of having returned the goods. The latter requirement would be removed, which would mean that a trader could withhold the reimbursement of money paid by a consumer until the goods have been received back, except where the trader has offered to collect the goods himself. Secondly, a consumer would no longer have a right of withdrawal where the consumer has handled the goods "during the right of withdrawal period, other than what is necessary to establish the nature, characteristics and functioning of the goods."<sup>69</sup> This changes the current situation, according to which a consumer is liable for a reduction in the value of the goods resulting from the consumer having handled

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<sup>68</sup> Cf. the discussion in C.Twigg-Flesner, "Disruptive Technology – Disrupted Law?" in A.De Franceschi (ed.) *European Contract Law and the Digital Single Market* (Intersentia, 2016), pp.34-6; and in "Conformity of 3D-prints – can current sales law cope?" in R.Schulze and D.Staudenmeyer, *Digital Revolution: Challenges for Contract Law in Practice* (Nomos, 2016), pp.51-3.

<sup>69</sup> Proposed new paragraph (n) to Art.16 CRD, which sets out exceptions from the right of withdrawal.

the goods more than is necessary.<sup>70</sup> Under the current rules, the trader would still have to take the goods back, whereas under the new rules, the consumer would no longer be entitled to withdraw from the contract in the first place.

Several changes are related to the broadening of the CRD's scope with regard to digital content and digital services. Thus, Art.8(4) CRD, which deals with contracts concluded through a means of distance communication permitting only limited space or time, is amended to remove the obligation to provide the model withdrawal form from Annex 1 CRD. Secondly, the provisions in Art.7(3) and Art.8(8) dealing with instances where the provision of a service starts at the consumer's request before the withdrawal period has expired. Both Articles already require that the consumer must make an express request to this effect on a durable medium. As the definition of "service" would be extended to cover "digital services", both Articles would be limited to services for which the consumer has to pay money. Art.16 CRD would be amended accordingly by adding a new paragraph (m) to exclude this situation from the right of withdrawal.<sup>71</sup> These changes would not extend to contracts where the digital service is provided in return for personal data. Both these changes seek to ensure that the CRD is brought up-to-date for the digital single market.

A third amendment is made to Art.13,<sup>72</sup> dealing with the trader's obligations once the consumer has exercised the right of withdrawal, for instances where the consumer had provided personal data under the contract prior to withdrawal. A new paragraph (4) would require the trader to comply with the obligations under the GDPR (Regulation 2016/679). Presumably, the main obligations here relate to return of the data and deleting it from the trader's database. With regard to any other digital content not constituting personal data uploaded or created by a consumer using the digital content or digital service, a new Art.13(5) would require a trader to follow the obligations which arise under the forthcoming Directive on Digital Content and Digital Services after termination of a contract. In both instances, therefore, the amendments to the CRD seek to ensure consistency and coherence with EU laws already in place (or likely to be in place by the time the Modernisation Directive might be adopted).

### C. Extended provisions on sanctions

The lack of a strong and consistent approach to sanctions in current EU directives has prompted a proposal to introduce more detailed rules on the sanctions and penalties to be imposed by the enforcement bodies of the Member States for breaches of consumer protection rules. Identical articles on sanctions are inserted into the UCPD, the CRD, the Unfair Terms Directive (93/13/EEC), and the Price Indication Directive (98/6/EC).<sup>73</sup>

The key obligation on the Member States will be to lay down the rules on penalties (including fines) and to ensure that these are effectively implemented. As will be familiar, such penalties must be effective, proportionate and dissuasive. The rules on penalties provided for at Member State level would have to be notified to the Commission.

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<sup>70</sup> Current Art.14(2) CRD.

<sup>71</sup> Art.2(9)(b) Modernisation Proposal.

<sup>72</sup> Art.2(7)(b) Modernisation Proposal.

<sup>73</sup> By Articles 1(5), 2(10), 3 and 4 of the Modernisation Proposal.

The first novelty that would be introduced is a set of the criteria which should be applied when determining whether to impose a penalty, and at what level. The criteria are:

- "(a) the nature, gravity and duration or temporal effects of the infringement;
- (b) the number of consumers affected, including those in other Member State(s);
- (c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- (d) where appropriate, the intentional or negligent character of the infringement;
- (e) any previous infringements by the trader;
- (f) the financial benefits gained or losses avoided by the trader due to the infringement;
- (g) any other aggravating or mitigating factor applicable to the circumstances of the case."<sup>74</sup>

Where the penalty to be imposed is a fine, the trader's turnover and net profits, as well as fines already imposed in other Member States, should be taken into account. A further provision, designed to enhance the cross-border enforcement of consumer law, is that in the case of "widespread infringements",<sup>75</sup> fines must be available as a possible sanction. The maximum amount of fines which can be imposed must be *at least* 4% of the trader's annual turnover in the particular Member State. In other words, these new rules would provide minimum harmonisation of the maximum fine any Member State could levy, but it will be possible for Member States to go higher than 4%. Member States will also be required to "take into account the general interests of consumers" when deciding how to allocate the money raised from the fines.

This aspect of the proposal would result in considerably more detailed European requirements on the Member States when determining the kinds of penalties they might impose for breach of consumer protection rules. The detailed criteria for determining what level of penalty to impose should help to promote greater consistency. That said, one might expect business organisations to be less-than-welcoming about this aspect of the proposal.

## 4. Comments

The preceding discussion has attempted to offer a critical discussion of the various proposals put forward in the Modernisation Directive. It would not be wrong to describe these proposals as a "mixed bag" in every sense of the phrase: some of them are intended to ensure that existing EU rules can work in the digital environment, whereas others deal with a diffuse range of often significant issues. The substance of the proposals is similarly varied: some are reasonably clear and straightforward, but others raise as many, if not more, questions than they are intended to resolve.

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<sup>74</sup> E.g., Art.3 of the Modernisation Proposal.

<sup>75</sup> Defined in Art.3(4) of the Enforcement Co-operation Regulation (2017/2934) as "a widespread infringement that has done, does or is likely to do harm to the collective interests of consumers in at least two-thirds of the Member States, accounting, together, for at least two-thirds of the population of the Union".

Several of the proposals are specifically intended to ensure that the *acquis* is suitable for the digital economy (or rather, the digital single market). With a new Directive on digital content and digital services imminent (final adoption is expected in the summer of 2018), it is sensible to review the Consumer Rights Directive to ensure it fully covers digital content and digital services contracts. The changes made here, to definitions and key provisions about the provision of information and the right of withdrawal, are necessary. However, the specific proposal regarding additional information requirements for online marketplaces, particularly about the supplier's status, does not go far enough to address a well-known problem. At the very least, this proposal needs to be accompanied by clear criteria for determining whether a particular supplier should be treated as a "trader". One of the characteristics of the digital world is that old categories (such as the notion of "trader") are not always easy to apply in the digital context, and further elaboration on this important distinction is needed.

It is possible to observe a more general attitude at the European level towards the challenges posed by the digital economy. The literature on the law's response to technological developments<sup>76</sup> identifies as a main challenge the need to monitor developments carefully before determining whether adjustments to existing laws and incremental development would be a sufficient response, or whether more radical change is needed to ensure that the new challenges posed by a technological development are addressed adequately. The European Commission has opted, at least for now, for an incremental approach which seeks to preserve as much of the *acquis* as possible in its current form, making only those amendments viewed as essential. There may be all sorts of reasons for this, not least the restraint demanded of European action by the principles of subsidiarity and proportionality in Art.5 TEU. However, one might ask whether there is insufficient willpower, or even courage, to take the rapid rise of the digital economy and its disruptive effect as an impetus to recast EU Consumer Law more fundamentally. It would be a much more difficult and resource-intensive task, but perhaps one that should be tackled to ensure that EU Consumer law is really ready for the digital age.<sup>77</sup>

Out of the proposals not specifically geared towards the digital economy, the most significant one is the proposal for private remedies in respect of unfair commercial practices. The lack of private remedies in the original UCPD was regrettable, and it is not surprising that some Member States opted for unilateral action on this. Adding a right to private remedies to the UCPD therefore is welcome as a matter of principle. However, as the discussion above has demonstrated, the proposal itself is underdeveloped and feels like a quick-fix, rather than a properly developed proposal which has explored all the various angles which the introduction of such a right would entail. The Commission justifies the vagueness of the proposed new Article 11a UCPD on the basis that in its current form, it would comply with the principle of proportionality. This does not convince, for the reasons stated earlier.

Finally, a comment on one development regarding a key characteristic of recent initiatives in EU Consumer Law: maximum harmonisation. The limited concession to the Member States

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<sup>76</sup> See e.g., L. Bennett Moses, 'Recurring Dilemmas: The Law's Race to Keep up with Technological Change' [2007] *University of Illinois Journal of Law, Technology and Policy* 239; N. Katyal, 'Disruptive Technologies and the Law' (2014) 102 *Georgetown Law Journal* 1685; C. Twigg-Flesner, "Disruptive Technology – Disrupted Law?" in A. De Franceschi (ed.) *European Contract Law and the Digital Single Market* (Intersentia, 2016).

<sup>77</sup> Cf. the conclusions in G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (Routledge, 2017), ch.9.



that permits a derogation from the maximum harmonisation standard in the UCPD in respect of off-premises contracts seems, at one level, to be little more than window-dressing. However, it does seem to be an acknowledgement that maximum harmonisation can read too far into the Member States when it should not do so. One might think that this is such a minor issue that it barely matters, but this change to Art.3 UCPD would be highly significant, as it reflects the need to allow Member States to tackle national or local issues free from the constraints of maximum harmonisation. There is no reason why a broader derogation from the UCPD should not be considered to allow Member States to respond to issues without a cross-border impact in a way less constrained by maximum harmonisation. An even bolder step - and one more beneficial for high consumer protection - would have been the introduction of a proper safeguard procedure, permitting Member States to take unilateral action in respect of a commercial practice causing particular concerns in that Member States, subject to Commission oversight. It is also worthwhile noting here that there is an implicit recognition that Member States should have greater freedom to regulate in respect of matters with a limited, or no, effect on the Single Market. Perhaps distinguishing between domestic and cross-border transactions, as proposed in the long-abandoned Common European Sales Law, was not such a bad idea after all.<sup>78</sup>

## 5. Conclusions: A “bad hand”?

The proposals discussed in this article are all part of the so-called "New Deal for Consumers". Labelling these measures as a "New Deal" is rather hyperbolic. Most of these proposals are essentially incremental developments of existing consumer protection rules. Some merely ensure the currency of EU consumer law in the digital era, whereas others could enhance it in small ways. This, of course, is important, and all of these proposals would lead to improvements of EU Consumer Law. But there is nothing in this "New Deal" which *fundamentally* changes the EU's approach to consumer protection. Few of these proposals merit the label "New Deal". A proper new deal would have been an initiative to launch a fundamental review of EU consumer law, starting with its guiding principles, and reimagining the whole of the consumer *acquis*. If the current proposals are all the cards which have been dealt to EU consumers, then many might be excused for feeling that they are holding a bad hand right now.

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<sup>78</sup> Cf. C.Twigg-Flesner, *A Cross-Border-Only Regulation for Consumer Transactions in the EU – A New Approach to EU Consumer Law* (Springer, 2012).